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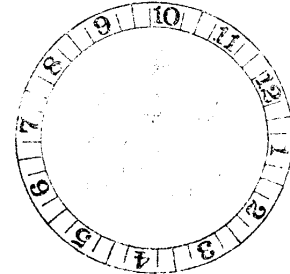
THOMAS F. McFARLAND

November 15, 2004

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 710
1925 K Street, N.W.
Washington, DC 20423-0001

RECEIVED
NOV 16 2004



Re: Docket No. AB-878, *City of Peoria, Illinois and Village of Peoria Heights, Illinois -- Adverse Discontinuance -- Pioneer Industrial Railway Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Application For Adverse Discontinuance Of Operating Authority, for filing with the Board in the above referenced matter.

A filing fee for the petition is not required under 49 C.F.R. § 1002.2(e)(1) inasmuch as the applicants are local governmental agencies.

ENTERED
Office of Proceedings

NOV 16 2004

Part of
Public Record

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Petitioners

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NOV 16 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF PEORIA, ILLINOIS AND)	
VILLAGE OF PEORIA HEIGHTS,)	
ILLINOIS -- ADVERSE)	DOCKET NO. AB-878
DISCONTINUANCE -- PIONEER)	
INDUSTRIAL RAILWAY CO.)	

**APPLICATION FOR ADVERSE
DISCONTINUANCE OF OPERATING AUTHORITY**

CITY OF PEORIA, ILLINOIS
CITY HALL
419 Fulton Street
Peoria, IL 61602

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
VILLAGE HALL
4901 North Prospect Rd.
Peoria Heights, IL 61616

Applicants

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Applicants

DATE FILED: November 16, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF PEORIA, ILLINOIS AND)	
VILLAGE OF PEORIA HEIGHTS,)	
ILLINOIS -- ADVERSE)	DOCKET NO. AB-878
DISCONTINUANCE -- PIONEER)	
INDUSTRIAL RAILWAY CO.)	

**APPLICATION FOR ADVERSE
DISCONTINUANCE OF OPERATING AUTHORITY**

Pursuant to the Board's decision in this proceeding served September 10, 2004, granting a partial waiver of the Board's abandonment regulations, the CITY OF PEORIA, ILLINOIS and the VILLAGE OF PEORIA HEIGHTS, ILLINOIS ("the Municipalities") hereby file this application for a determination under 49 U.S.C. § 10903 that public convenience and necessity permit discontinuance of the operating authority of Pioneer Industrial Railway Co. (Pioneer) over the Kellar Branch at Peoria and Peoria Heights, IL.

STATEMENT OF THE CASE

This proceeding is governed by a distinct line of decisions that grant adverse discontinuances where the owner of a rail line proposes to replace an operator after the latter's contractual or property right to operate over the line has expired or has been lawfully terminated, but the operator refuses to voluntarily give up its operating authority. *See, e.g., Fore River R.R. Co. - Discon. Exempt. - Norfolk County, MA*, 8 I.C.C.2d 307 (1992); *Cheatham County Rail Authority Application and Petition for Adverse Discontinuance*, 1992 ICC LEXIS 224 (Docket No. AB-379X, decision served Nov. 4, 1992); *Jacksonville Port Authority - Adverse Discontinuance - in Duval County, FL*, 1996 STB LEXIS 200 (Docket No. AB-469, decision

served July 17, 1996); and *Tacoma Eastern Ry. Co. - Adverse Discon. of Oper. Applic. - a Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA*, 1998 STB LEXIS 790 (Docket No. AB-548, decision served Oct. 16, 1998).

The Kellar Branch is 8.29 miles in length. It extends from a point of connection to the Peoria and Pekin Union Railway Company (P&PU) at Milepost 1.71 to a stub end at Milepost 10.00, in the City of Peoria, Illinois and the Village of Peoria Height, Illinois. P&PU in turn connects with all major rail carriers that serve the Peoria area, i.e., Burlington Northern and Santa Fe Railway Company (BNSF), Canadian National Railway Company (CN), Iowa Interstate Railroad Company (IAIS), Illinois & Midland Railway Company (IMRR), Norfolk Southern Railway Company (NS), Toledo, Peoria and Western Railway Company (TP&W), and Union Pacific Railroad Company (UP).

The Kellar Branch formerly was owned and operated by the Chicago, Rock Island & Pacific Railroad Company (Rock Island). The Branch was acquired by the City of Peoria from the bankrupt Rock Island's Trustee in 1984. That acquisition did not require approval of the Board's predecessor, the Interstate Commerce Commission (ICC), because the line had been abandoned by the Rock Island prior to the City's acquisition.

The City of Peoria entered into an agreement with P&PU on July 10, 1984 for P&PU to operate over the line to provide service to shippers. P&PU obtained an exemption from the ICC for its operation. *Peoria and Pekin Union Ry. Co. - Exemption from 49 U.S.C. 10901*, 1984 ICC LEXIS 275 (Finance Docket No. 30545, decision dated Sept. 18, 1984).

Subsequent to that agreement, the Village of Peoria Heights, Illinois acquired a 25-percent ownership interest in the Kellar Branch. Upon that acquisition, the Kellar Branch also came to be known by the doing-business-as name of Peoria, Peoria Heights & Western Railroad.

Pioneer became the operator of the Kellar Branch in 1998 as assignee of P&PU under the operating agreement with the Municipalities. *Pioneer Industrial Railway Co. - Lease & Oper. Exempt. - Peoria, Peoria Heights & Western Railroad*, 1998 STB LEXIS 1417 (Finance Docket No. 33549, decision served Feb. 20, 1998).

The agreement with P&PU-Pioneer for operation of the Kellar Branch has a 20-year term.^{1/} The agreement expired on July 10, 2004. Prior to that date, the Municipalities notified Pioneer that they intended to contract with a different rail operator for continued operation of the line as of that date. The City of Peoria entered into such an agreement with Central Illinois Railroad Company (CIRY). CIRY has obtained an STB exemption for its operation of the Kellar Branch. *Central Illinois R. Co. - Oper. Exempt. - Rail Line of the City of Peoria and Village of Peoria Heights, in Peoria and Peoria Heights, Peoria County, IL*, 2004 STB LEXIS 412 (Finance Docket No. 34518, notice of exemption served June 28, 2004).^{2/}

Upon being notified of the intent of the Municipalities to change operators of the Kellar Branch, Pioneer made it known that it would not surrender its operating authority over the

^{1/} Pioneer has argued that the agreement is open-ended because the term-of-agreement provision states that the term is "a minimum period of 20 years." However, that simply means that the Municipalities could not terminate the agreement except for cause in less than 20 years. The provision clearly reflects the intent of the parties that the agreement have a 20-year term.

^{2/} The Board denied a petition filed by Pioneer for a stay of that exemption. *Id.*, decision served July 1, 2004.

Branch voluntarily. That has necessitated this application for adverse discontinuance of Pioneer's operating authority.

The operating agreement between the City of Peoria and CIRY is temporary until the City completes a track connection between the Kellar Branch and a 1.9-mile rail line west of the Kellar Branch that the City acquired in 2001 from UP. *See City of Peoria, Illinois -- Acq. & Oper. Exempt. -- Union Pacific R. Co.*, 2001 STB LEXIS 624 (Finance Docket No. 34066, notice of exemption served July 25, 2001). The City has obtained an exemption for construction of that track connection. *See City of Peoria, IL -- Constr. of Connect. Track Exempt. -- Peoria County, IL*, 2004 STB LEXIS 601 (Finance Docket No. 34395, decision served Sept. 27, 2004). After completion of that track connection, CIRY will provide service from the west to the two shippers who are located on the western part of the Kellar Branch. The third shipper, who is located on the eastern part of the Kellar Branch, will be served from the east by CIRY or by another rail carrier arranged for by the City.

Upon completion of the track connection and implementation of the service described above, no shippers would be located on a 6.29-mile segment of the Kellar Branch in between the active shippers, and that segment would no longer be used nor required to provide rail service to those active shippers. It is proposed at that time to convert that segment into a recreational trail. Pioneer has argued that the transaction before the Board here is an adverse abandonment rather than an adverse discontinuance in light of the City's plan to convert much of the Kellar Branch into a recreational trail. However, that argument overlooks the fact that Board authority is not required for abandonment of the Kellar Branch (once discontinuance authority is secured) inasmuch as the Branch had already been abandoned by the Rock Island Trustee when the City

acquired it without the need for Board acquisition authority. Pioneer's argument is technical rather than substantive in any event inasmuch as no shipper in Peoria would lose rail service as a result of the track construction, service alteration and trail conversion. In substance, therefore, this is an adverse discontinuance proceeding incidental to a change of rail operators, to which the line of decisions cited earlier clearly applies.

**INFORMATION REQUIRED PURSUANT
TO THE BOARD'S WAIVER DECISION**

The information hereby furnished is verified by Mr. Steve Van Winkle, Director of Public Works, City of Peoria, who has personal knowledge thereof. Mr. Van Winkle's verification is attached to this application as Appendix 1.

(1) the name and address of the applicant;

Applicants are:

City of Peoria, Illinois
City Hall
419 Fulton Street
Peoria, IL 61602

Village of Peoria Heights, Illinois
Village Hall
4901 North Prospect Rd.
Peoria Heights, IL 61616

(2) the name and address of counsel;

Counsel is:

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
312-236-0204

(3) a detailed map of the facilities involved;

A map of the Kellar Branch is attached to this application as Appendix 2.

(4) total carloads broken out for each of the shippers currently using the line;

Total carloads in recent periods for shippers on the Kellar Branch are shown below:

<u>Shipper</u>	<u>2002</u>	<u>2003</u>	<u>2004 (2 mos.) ^{3/}</u>
Carver Lumber Co.	52	64	6
Peoria Plastics	19	1	0
O'Brien Steel Co.	74	81	10
Gateway Milling Co.	3	0	0
Total Traffic	148	146	16

Gateway Milling Company no longer ships by rail over the Kellar Branch. Its most recent use of the Branch was in January, 2002 for 3 carloads. It is currently shipping by rail from a facility that it owns in Bartonville, IL.

(5) summary of the principal commodities handled;

The principal commodities handled are forest products, plastic pellets and iron-steel articles.

(6) summary operating plan for the operations of the substitute carrier;

The proposed operator is CIRY. Pending completion of the track connection described in note 1, *supra*, CIRY proposes to serve the Kellar Branch on an as-needed basis.

(7) certification that the substitute carrier's current or proposed operations comply or will comply, with all federal and state safety requirements;

A certification of Mr. Don L. Gibson, President of CIRY, that CIRY's operations over the Kellar Branch will comply with all federal and state safety requirements, is attached to this application as Appendix 3.

^{3/} The Municipalities do not have any later traffic information.

(8) opinion of counsel that the prior agreement with PIRY for operation of the Kellar Branch expired in accordance with its terms;

Attached to this application as Appendix 4 is an opinion of Thomas F. McFarland, counsel for the Municipalities, that their prior agreement with Pioneer for operation of the Kellar Branch expired on July 10, 2004, in accordance with its terms. That agreement was entered into on July 10, 1984. It had a term of 20 years. It thus expired by its terms on July 10, 2004 (*see* note 1, *supra*).

(9) documentation from the Cities that authorizes the operations of the substituted service;

Attached to this application as Appendix 5 is a copy of an Agreement for Kellar Branch Interim Trackage Rights that authorizes CIRY to operate over the Kellar Branch.

(10) a statement on behalf of the Cities of the reasons for the application and the benefits that will be obtained if the application is approved; and

When the term of Pioneer's operating agreement expired, the Municipalities decided to replace Pioneer with a different operator for future rail operations. The operating agreement did not require the Municipalities to provide a specific reason for doing so.

This application became necessary when Pioneer refused to voluntarily relinquish its rail operating authority upon expiration of its operating agreement with the Municipalities. The benefit that will be obtained if this application is approved is continued rail service by an operator selected by the owner of the rail line.

(11) supporting statements from shippers.

Attached to this application are the following:

- (1) letter from Mr. J.P. O'Brien, O'Brien Steel Service, dated October 11, 2004;

- (2) letter from Mr. Gus Poulis, Bleyer Industries, Inc., parent company of Peoria Plastics, dated October 21, 2004;
- (3) letter from Mr. Rob Happach, Carver Lumber Company, dated October 19, 2004;
and
- (4) letter from Mr. Steve Van Winkle, City of Peoria, dated November 10, 2004,
responding to concerns expressed in Mr. Happach's letter of October 19, 2004 (to
which is attached a letter to the shippers from CIRY).

On the basis of those letters, it is fair to say that O'Brien Steel Service supports the Municipalities' replacement of Pioneer with CIRY as operator of the Branch, and that Peoria Plastics and Carver Lumber Company are neutral on the subject of that replacement. The City has responded to the concerns that were expressed by Carver Lumber Company.

ARGUMENT

The issue in an adverse discontinuance proceeding, as in an abandonment or discontinuance proceeding filed by the owner or operator of the rail line, is whether discontinuance of the operator's rail service is permitted by public convenience and necessity. 49 U.S.C. § 10903(d). In implementing that standard in an adverse proceeding, the Board considers the relative burdens that continuation of service on the one hand, and cessation of service on the other, would have on the involved carrier, on the owner-lessor of the rail line, and on the public. *Jacksonville Port Authority - Adverse Discontinuance - in Duval County, FL, supra*, 1996 STB LEXIS 200 at *13.

Where, as here, the owners of the rail line have arranged for continuation of rail service by a new rail operator after the prior operator's contractual authority to operate the line has

expired, and the shippers on the line either support or are neutral about the prior operator's discontinuance of service, the Board and its predecessor have consistently found that public convenience and necessity permit the discontinuance of service. Thus, in *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, *supra*, the ICC said (1992 ICC LEXIS 224 at *14-15):

... Our task is to determine whether MACO's discontinuing operations would harm shippers and the community. We cannot find that it will. Participating shippers either support or are neutral about MACO's discontinuing service. All CCRA board members want MACO removed. The record does not show that allowing discontinuance of operations will result in significant diminution of service to shippers ...

Similarly, in *Tacoma Eastern Ry. Co. - Adverse Discon. of Oper. Applic. - a Line of the City of Tacoma in Pierce, Thurston and Lewis Counties, WA*, the Board said (1998 STB LEXIS 790 at *17):

The public convenience and necessity support the requested grant of discontinuance authority. Of the four shippers on the line, three support replacement of TE by the Belt Line. The fourth says it 'would be open' to the services of the Belt Line. Allowing TE to discontinue operations will not result in a serious adverse impact on the shippers and the community. The Belt Line will provide, without interruption, all of the services currently being provided by TE ...

In granting the adverse discontinuance applications in the *Cheatham County Rail Authority* and the *Jacksonville Port Authority* cases, the ICC and STB emphasized that denial of adverse discontinuance would amount to a finding that the rail carrier should be permitted to continue to operate over the objection of the owner of the line despite the rail carrier's contract default. 1992 ICC LEXIS 224 at *16; 1996 STB LEXIS 200 at *16. The ICC and STB were unwilling to take that action in the absence of evidence that affected shippers and the community would be harmed by the discontinuance of service.

The same principle applies where, as here, the rail carrier's contractual authority to operate the line has expired by its terms, rather than having been terminated for cause. In that circumstance, the owner of the rail line should be permitted to replace the operator unless affected shippers and the community would be harmed as a result of the replacement. There is no evidence in the present record that shippers on the Kellar Branch or the community of Peoria would be harmed as a result of replacement of Pioneer with CIRY as operator of the Branch. Consequently, the application for adverse discontinuance authority should be granted.

While the Board lacks jurisdiction to interpret operating contracts between owners and operators of rail lines, the Board is in a position here to find, on a *prima facie* basis, that Pioneer's contractual right to operate the Kellar Branch has expired by its terms. The term of the operating agreement between the Municipalities and Pioneer is "a minimum period of 20 years." Pioneer takes the position that the quoted term means "forever," i.e., that the term is open-ended. The Municipalities take the position that the quoted term means that the agreement cannot be terminated for cause in less than 20 years, but that in the absence of such termination the agreement will expire in 20 years. The Board should find that there is a rational basis for the contention of the Municipalities that the agreement has a 20-year term, and that such term has expired.

No Board finding is required that Pioneer's rail service is inadequate as a prerequisite to a determination that discontinuance of Pioneer's service is permitted by public convenience and necessity. Where an owner of a rail line proposes to replace an operator after expiration of that operator's contractual right of operation, the question instead is whether the replacement

operator's rail service would be inadequate. There is no evidence in this record that CIRY's rail service would be inadequate in any respect.

Pioneer has contended that the proposal of the Municipalities is for abandonment of the Kellar Branch, rather than for discontinuance of Pioneer's rail service, on the ground that the Municipalities acknowledge that a segment of the Kellar Branch would be converted to a recreational trail at a later time. That contention is without legal force. The conversion would not result in loss of rail service for any shipper. To the extent that such conversion would constitute abandonment of that segment, it is clear that the Board would not have jurisdiction over any such abandonment. When the City of Peoria acquired the Branch from the Trustee of the bankrupt Chicago, Rock Island & Pacific Railroad Company a little more than 20 years ago, abandonment of the Branch by the Trustee had already become effective. Consequently, acquisition of the Branch was not subject to ICC jurisdiction, so that neither is abandonment of a segment of the Branch subject to STB jurisdiction.^{4/} See *Consolidated Rail Corp. - Petition for Declaratory Order*, 1 I.C.C.2d 284, 285 (1984) ("Upon abandonment, the line, as a legal matter, no longer function in interstate or foreign commerce and, in effect, is no longer an active rail line."). Accord: *SSW Ry. Co. - Aban. - in Smith and Cherokee Counties, TX*, 9 I.C.C.2d 406, 410 (1992) ("Once the abandonment has been consummated [footnote omitted], however, the rail properties no longer constitute a line of railroad, and our jurisdiction ends.").

In sum, Pioneer's contractual right to operate the Branch has expired. The Municipalities have decided to continue rail service over the Branch by virtue of an operating agreement with a

^{4/} In contrast, operation of a fully abandoned line is subject to Board entry and exit jurisdiction; hence, the filing of this application for adverse discontinuance of Pioneer's operation.

different operator, CIRY. Shippers on the line either support discontinuance of Pioneer's rail service or are neutral in that regard. There is no evidence that CIRY's rail service on the Branch would be inadequate in any respect. The City of Peoria proposes to convert a segment of the Branch into a recreational trail in the future. That action would not result in loss of rail service for any current shipper on the Branch. To the extent that such action constitutes an abandonment of that segment, the Board does not have jurisdiction over such abandonment because the Branch had been fully abandoned when the City of Peoria acquired it. Under these circumstances, discontinuance of Pioneer's rail service would not be harmful to shippers or the community. Consequently, the Board should find that discontinuance of Pioneer's rail service is permitted by public convenience and necessity.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Board should issue a decision finding that public convenience and necessity permit discontinuance of Pioneer's authority to operate over the Kellar Branch.

Respectfully submitted,

CITY OF PEORIA, ILLINOIS
CITY HALL
419 Fulton Street
Peoria, IL 61602

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
VILLAGE HALL
4901 North Prospect Rd.
Peoria Heights, IL 61616

Applicants

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

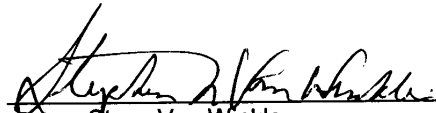
Attorney for Applicants

DATE FILED: November 16, 2004

VERIFICATION

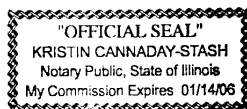
STATE OF ILLINOIS)
) SS
COUNTY OF PEORIA)

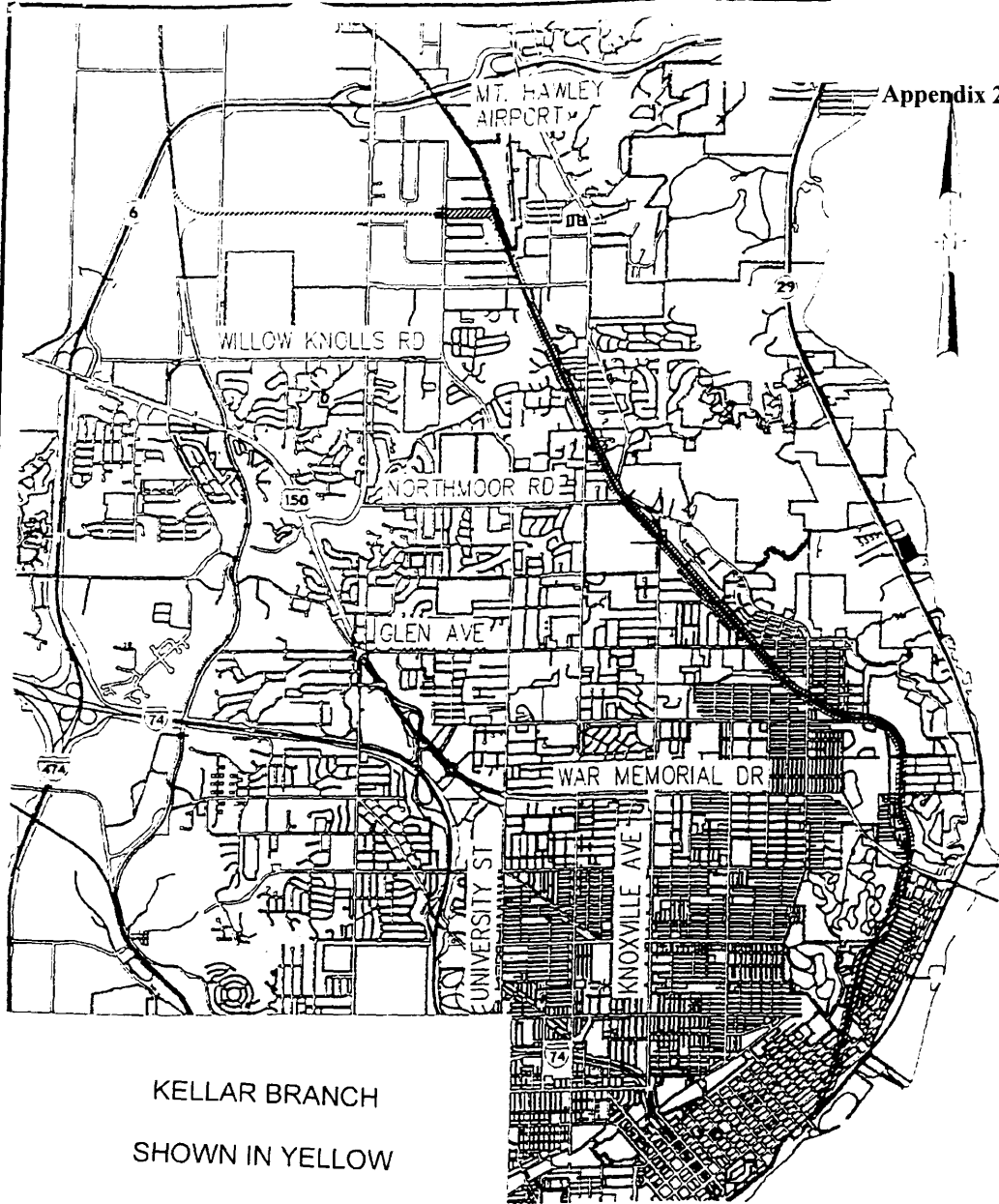
STEVE VAN WINKLE, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.


Steve Van Winkle

Subscribed and sworn to
before me this 10 day
of November, 2004.


Notary Public





Appendix 2

KELLAR BRANCH
SHOWN IN YELLOW

© Copyright Hanson Professional Services Inc. 2003



HANSON

Hanson Professional Services Inc.
2900 West Willow Knolls Road
Peoria, Illinois 61614-1129

PROJECT LOCATION MAP

KELLAR BRANCH
PEORIA, ILLINOIS

HANSON NO. 02P2007

FIGURE NO. 2

SEP 05, 2003 12:12 PM JLA
I:\02\05\02P2007\02P2007 PROJECT LOC MAP.DWG

Docket No. AB-878

Appendix 3

CERTIFICATION

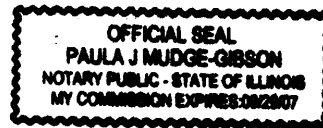
As President of Central Illinois Railroad Company (CIRY), I hereby certify that CIRY's proposed operations over the Kellar Branch at Peoria, Illinois will comply with all federal and state safety requirements.


DON GIBSON

SUBSCRIBED and SWORN
to before me this 17th day
of September, 2004.


Notary Public

My commission expires: 9-29-07



Appendix 4

OPINION OF COUNSEL

As counsel for the City of Peoria, Illinois and the Village of Peoria Heights, Illinois, it is my opinion that the Agreement entered into on July 10, 1984 (Agreement) between the City of Peoria (the City) and the Peoria and Pekin Union Railway Company (P&PU), to which Pioneer Industrial Railway Company (PIRY) was a party as assignee of P&PU, and which provided for PIRY's contractual authority to operate over the Kellar Branch, expired by its terms on July 10, 2004.

The Agreement was entered into on July 10, 1984. Pursuant to Section 9(a) of the Agreement, the Agreement had a 20-year term, viz.:

This agreement shall remain in full force and effect for a minimum period of twenty (20) years unless and until terminated for cause as set forth above or by mutual consent.

In my opinion, the term "a minimum period of 20 years" means "no less than 20 years" or "at least 20 years." That provision does not entitle either party unilaterally to extend the Agreement beyond 20 years. In my opinion, there is no rational basis for a contention that the term of the Agreement exceeds 20 years, nor that the Agreement remained in effect beyond July 10, 2004.



Thomas F. McFarland
Attorney for the City of Peoria, IL

Appendix 5

AGREEMENT
(Kellar Branch Interim Trackage Rights)

This Agreement, by and between the CITY OF PEORIA, ILLINOIS, a Illinois municipal corporation with its principal offices at 419 Fulton Street, Peoria, Illinois 61602, hereinafter the "CITY"; and CENTRAL ILLINOIS RAILROAD COMPANY (a common carrier), an Illinois corporation owned by the shareholders of DOT RAIL SERVICE, INC., with its principal offices at P.O. Box 259, Granville, Illinois 61326, hereinafter referred to as "DOT", entered into this 27th day of April, 2004, WITNESSETH:

WHEREAS, the CITY has an ownership interest in a Rail Line known as the Peoria, Peoria Heights & Western Railroad, extending from E.P.S. 75 + 00 (M.P. 1.61) to E.P.S. 516 + 21 (M.P. 10.0), in Peoria County, Illinois, being the former "Kellar Branch" of the Chicago, Rock Island & Pacific Railroad Company (herein the "Rail Line"); and

WHEREAS, DOT and the CITY have entered into an Agreement dated June 26, 2000 pertaining to service from the West to be provided exclusively by DOT after it builds a connection from Pioneer Junction to Pioneer Park; and

WHEREAS, the CITY's current Agreement for trackage rights on the Kellar Branch terminates July 10, 2004; and

April 12, 2004 *nx* \

WHEREAS, the Parties deem it in their best interest that DOT provide exclusive service over the Kellar Branch during an interim period until the connection from the west is completed.

NOW, THEREFORE, in consideration for the joint and mutual promises contained herein, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

Article 1. TRACKAGE RIGHTS

1.1 The CITY hereby grants unto DOT the exclusive right to operate its engines, cars and trains over the existing Kellar Branch, including sidetracks and industry tracks; provided, however, that the CITY shall not be in breach of this Agreement if the present operator fails to vacate the Rail Line.

1.2 DOT shall have the exclusive right under the foregoing grant to serve all existing industries now located on or adjacent to said track and industries and any industries which may, in the future, be served over the Kellar Branch or portions thereof.

1.3 No other entity, railway company or person shall be permitted to operate at any time on Kellar Branch, except DOT or its subsidiary, or parent.

Article 2. INTERCHANGE AGREEMENT

DOT shall use all commercially reasonable efforts to obtain an interchange agreement with the Peoria and Pekin Union Railroad under terms that will not materially increase the rates charged Kellar Branch customers or

significantly alter the service level presently provided over the Kellar Branch. Commercially reasonable efforts shall include, if necessary, the duty to pursue all available remedies through the Surface Transportation Board ("STB") or other regulatory agency having jurisdiction to order such interchange agreement.

Article 3. OWNERSHIP, OPERATION AND MAINTENANCE

3.1 DOT shall not be granted ownership rights to any track as a result of this Agreement.

3.2 The mode of operation over said track shall be under the exclusive control of DOT.

3.3 CITY shall be responsible for maintenance of roadways and street crossings (excluding rails, ties and signal devices on roadways and streets) under the jurisdiction of the CITY.

3.4 DOT shall assume the responsibility for all maintenance of tracks, crossing protection, and roadbed including weed, brush, snow and ice control thereon, all drainage control maintenance, and all weed and brush control on the remainder of the right-of-way, following the guidelines set forth by the Federal Railroad Administration (FRA).

3.5 The movement of engines, cars and trains of DOT on said tracks shall be performed pursuant to federal, state and local government laws and FRA regulations.

tracks or out of the DOT's use of said tracks or operations of its trains, cars or engines thereof, from any cause whatsoever regardless of the negligence of the CITY, its agents, employees or assigns.

4.3 DOT hereby agrees to indemnify and save the CITY, its agents, employees and assigns harmless from and against loss of or damage to property, and injury to or death of persons whomsoever, arising or growing out of any act or omission of the officers, agents or employees of DOT in its exclusive use of or operation on or over said tracks.

4.4 The DOT agrees to name the CITY as additional insured on all liability policies covering DOT's exclusive operation of said track. DOT shall provide the CITY with a Certificate of Insurance listing the CITY as additional insured and providing the CITY with a thirty (30) day notice of any cancellation of the policy. DOT shall maintain liability insurance with limits of Five Million dollars (\$5,000,000) per occurrence; in the event DOT institutes passenger service, then said insurance policy shall have limits of Ten Million dollars (\$10,000,000).

Article 5. FEE FOR TRACKAGE RIGHTS

For the use of said tracks by DOT pursuant to the provisions hereof, DOT shall pay to the CITY the sum of One Dollar (\$1.00) per annum. DOT shall make this payment to the CITY within fifteen (15) days after the effective date of this Agreement. Subsequent annual payments will be made within fifteen (15)

days after the anniversary date of this Agreement provided, however, that no such fee shall be due until operation from the west is ready to commence.

Article 6. REPORTS AND RECORDS

6.1 DOT agrees to submit a report to the CITY on a calendar month basis.

6.2 All records of DOT pertaining to the movement of cars over and upon any part of the said tracks shall be open and available to the inspection of any duly authorized representative of the CITY at any and all times during normal business hours for the purpose of checking and verifying statements furnished by DOT in accordance with the provisions hereof.

Article 7. DEFAULT

The rights herein granted to DOT are expressly conditioned upon the performance by DOT of all, and singular, the covenants and agreements herein set forth to be performed by DOT. In the event DOT shall default in the performance of any of its obligations hereunder, and such default shall continue for a period of sixty (60) business days after the receipt of written notice, at any time thereafter the CITY may terminate this Agreement forthwith, in addition to any other legal remedies which the CITY may have.

April 12, 2004, *ced*

Article 8. TERM OF AGREEMENT

This Agreement is intended to be temporary in nature and is intended to terminate within sixty (60) days after the CITY completes the connection called for in the Agreement between these Parties dated June 25, 2000.

Article 9. NOTICES

All notices required pursuant to this Agreement to the CITY shall be addressed to the City Manager, City of Peoria, 419 Fulton, Room 207, Peoria, IL 61602. All notices to DOT shall be addressed to Central Illinois Railroad Company, P.O. Box 259, Granville, IL 61326.

Article 10. ASSIGNMENT

DOT shall not transfer, assign or convey the rights granted hereunder without the written consent of the CITY and only upon the condition that the assignee shall abide by all terms, conditions and agreements hereof.

Article 11. LEVEL OF SERVICE

DOT shall pick up and deliver cars within twenty-four (24) hours after being notified by the P&PU that the cars have been placed on the Kellar Branch.

Article 12. RESERVED RIGHT OF ABANDONMENT

This Agreement shall in no way be construed as requiring or obligating the CITY to continue its ownership, maintenance, improvement or operation of the Kellar Branch, or the appurtenances thereto, nor in any way limit the CITY from disposing of, encumbering, or abandoning all or any part hereof, at any

time it may see fit. The CITY has in fact found another governmental use for the Kellar Branch and it is anticipated that the line will be abandoned and railbanked for use as a trail. In consideration for the trackage rights granted in the Agreement dated June 26, 2000, DOT agrees that it will not oppose any such abandonment nor make an offer to purchase such parts of the Kellar Branch as lie between Pioneer Park and O'Brien Steel.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date first written above.

CITY OF PEORIA, ILLINOIS

By: Charles R. Oliver
Its City Manager

CITY OF PEORIA, ILLINOIS

Attested to by:

Mary J. Haynes
Its City Clerk

Approved as to form:

Randall Ray
Randall Ray, Corporation Counsel

CENTRAL ILLINOIS RAILROAD COMPANY

Don L. Gibson
By: Don L. Gibson, Vice President

April 12, 2004

Appendix 6

O'BRIEN STEEL SERVICE

1800 N.E. ADAMS STREET • P.O. BOX 5699 • PEORIA, ILLINOIS 61601-5699
PHONE (309) 671-5800 • FAX (309) 671-5213

October 11, 2004

RE: Docket No. AB-878

To Whom It May Concern:

O'Brien Steel Service Co. is a user of the Kellar Branch of the Peoria, Peoria Heights and Western Railroad. During the past three years, O'Brien Steel Service has registered the following car counts of use over the Kellar Branch:

<u>Year</u>	<u>Cars</u>
2002	74
2003	81
(YTD) 2004	60 (estimated - based upon overall volume)

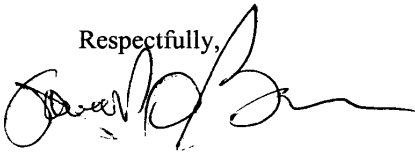
We are aware that the City of Peoria and the Village of Peoria Heights, as owners of the Kellar Branch, desire to replace the current rail operator, Pioneer Railway Co. (Pioneer) with a new rail operator, Central Illinois Railroad Company (Central Illinois), and that this is a Surface Transportation Board proceeding to decide whether Pioneer's railroad authority over the Branch should be discontinued.

Pioneer has not maintained positive relationships with O'Brien Steel over the last few years. Most significantly, last July we developed a new customer for scrap steel in an outlying market. Previously, all sales of scrap steel were limited to existing customers located within our immediate geographical area that were accessible only by truck. After two or three railcar shipments our newly established customer reduced the price on our scrap steel to the point it no longer became economically feasible to continue shipments. We were told by our customer the reason for the reduction in price was to offset the increase incurred because the Pioneer increased their rate three times over a dispute

between the Pioneer and another railroad as to which carrier would provide the railcar used for shipment. O'Brien Steel's newly found business opportunity was not given any consideration in any decision made.

O'Brien Steel applauds the City of Peoria for selecting Central Illinois Railroad as the new operator of the Kellar Branch. We have had a positive working relationship with Central Illinois Railroad's related track construction company – D.O.T. Railway – and anticipate continuing that relationship with Central Illinois.

Respectfully,

A handwritten signature in black ink, appearing to read "J.P. O'Brien", with a long horizontal flourish extending to the right.

J.P. O'Brien
President
O'Brien Steel Service Co.



received
10.25.04

SW.
10-25-04

260 W. SUNRISE HIGHWAY • P.O. BOX 9019 • VALLEY STREAM, NY 11582-9019 • 516-374-3800 • FAX: 516-374-3980

October 21, 2004

Mr. Steve Van Winkle
Director of Public Works
City Hall Building
419 Fulton Street, Room 307
Peoria, IL 61602

Re: Continued rail service to Peoria Plastics via the proposed connection to the Union Pacific Railroad.

Dear Mr. Van Winkle:

Bleyer Industries is the owner of Peoria Plastics located at 9000 N. University Street in Pioneer Industrial Park. We have been at that location for a number of years, but we have only been utilizing rail service for the past few years. Regardless, the service we have been receiving from the Pioneer Rail Corporation has been excellent, and the cost of the service has saved us money over the cost of trucking.

We understand that the City of Peoria would like to rail bank the Kellar Branch, which is currently the basis for our rail service to be replaced by a Western connection to the Union Pacific Railroad.

The issue for us is quite simple. If we can receive the same level of service at a reasonable cost, we have no problem in being served from the West. For us this is purely a business decision.

As a result, if you provide to us the assurances concerning cost and service remaining essentially the same, we are fully supportive of the new connection to the West being our source of rail service. We also appreciate the tremendous effort that has been a part of achieving the new alternative, and we are grateful for the commitment of the City to this aspect of industrial development.

We hope you are successful in attracting new rail users, not only into Pioneer Park, but to the new Growth Cell to the West as well.

Yours truly,

Gus Poulis
C.E.O.
Bleyer Industries, Inc.

GP/jb

October 19, 2004



8700 N. UNIVERSITY AVE.
PEORIA, ILLINOIS 61615
(309) 692-2000 • FAX (309) 693-7919

Mr. Steve Van Winkle
Director of Public Works
City Hall Building
419 Fulton St. Rm. #307
Peoria, IL. 61602

SW
10-22-04

RE: Continued Rail Service to M.S. Carver Lumber Company
Via the Kellar Branch line and/or the new proposed Western Connection to the Union Pacific.

Dear Steve:

The purpose of this letter is to outline our company's thoughts with regards to continued rail service, specifically from the West. Our studies over the years have consistently shown that trucking our core products is no substitute for reliable, appropriately-priced rail service. For the past several years Pioneer Rail Corporation (PRY) has provided us with excellent service. While it is true that PRY's rates have increased to our maximum threshold due to reduced traffic on the line, their service to us in all respects has been nearly flawless. Any loyalties that we have to PRY are a result of this record and we would be pleased to see them allowed to continue to operate as our delivering carrier. If continued operation by PRY on the line is not possible for some set of reasons, we do not object to working with a replacement carrier, provided that the City of Peoria can assure us of continued good service at rates that are at, or hopefully below what we are currently paying. For your use, here are some examples PRY's service that we feel would need to be duplicated in order for a replacement carrier to be successful:

- An engine is kept on the line at all times, ready to be pressed into service as needed, and crews are available on short notice to operate the equipment.
- We have a designated customer service rep assigned to our account and important information is regularly exchanged regarding car locations along the route as well as intended delivery schedules. When trouble develops in the delivery chain, our service rep does a good job of bringing other carriers into the mix so problems can be solved.
- Once cars are switched out by the PPU from line-haul carriers, PRY is actively engaged in securing the car from PPU for delivery to our business. Once the handoff from PPU is complete, delivery to us normally occurs no later than the next business day. When the cars are unloaded, they are normally retrieved by PRY within 1-2 business days (occasionally 3 days), depending on their situation.
- The PRY's exact portion of the cost rate is not easy to determine, but we do know that it has more than doubled since car traffic declined with the loss of Gateway Milling from the line. We do know what the total cost to us is for various repeat deliveries and it would be our expectation that our overall cost of delivery will not increase due to any change in the delivering carrier. If car volume is dramatically increased some day, or more efficient routing can occur via a Western connection, then we would expect rates to decline in response.

Carver Lumber Company desires to be a good corporate citizen and to cooperate with the City of Peoria in its attempt to provide a long-term solution to rail service issues for the industrial park and Growth Cell II. Likewise, our company desires a certain level of assistance and cooperation from the City of Peoria in our attempt to retain reliable rail service without further increased costs or interruption. In that respect we ask that the City of Peoria provide us with some reasonable assurances that any change in delivering carriers or future construction plans will not result in problems for our company. Therefore, we kindly request that any assurances be put in the form of a letter addressed to our company and include statements:

- Assuring that the City will not allow any interruption of rail service to occur during the planned construction of the Western connection.
- That the City will not allow discontinuation of service over the Kellar line until the Western connection is fully operational.
- Detailing what specific measures the City of Peoria has at its disposal to intercede on our behalf should serious issues related to service and/or cost arise.

In closing, if the City of Peoria can satisfy what we believe to be legitimate business considerations involving service and cost issues, then our company will not oppose the introduction of an alternate delivering carrier or the subsequent rail banking of the Kellar Branch Line if it is determined to be unavoidable and in the best interest of our business community and the citizens of the Peoria.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rob Happach".

Rob Happach
President

DEPARTMENT OF PUBLIC WORKS



November 10, 2004

Rob Happach
President
Carver Lumber Co.
8700 N. University
Peoria IL 61615

Re: Rail Service

Dear Rob:

Thank you for your letter of October 19, 2004. We appreciate your willingness to put Carver Lumber's concerns into writing. We feel that we are in a position to address those concerns.

The City already has the contract for construction of the Spur from the West. As you are aware, the City has funded this project with the help of a private donor from the other end of the Kellar Rail Line. It is anticipated that the Spur from the West will be built and ready for use in the Spring of 2005.

This letter is, in part, to tell you that the City has no intention of discontinuing service over the Kellar Line until the western connection is fully operational. These two projects are currently timed to coincide well. In the event that either is delayed, the City assures you that it will make an adjustment in the timeframe so that there is no interruption of your rail service. We will not discontinue service over the Kellar Line until the western connection is fully operational.

As for the ability of the City to intercede on your behalf should issues of service and/or cost arise in the future, we call to your attention that we have contracted with DOT for service from the West. Article 14 of that contract specifically provides that DOT shall pick up and deliver cars within 24 hours after being notified by the UP that the cars have been placed on the Peoria Pioneer Spur. The City stands ready and willing to enforce all aspects of its contract with DOT and with the Union Pacific Railroad. The City has the ability, under its agreement with DOT, for all legal remedies up to and including termination which would allow the City to replace their service with another company. I would point out that these are the same assurances that you have under your current working arrangement.

In closing, since 1984 the City of Peoria has had a strong commitment to see that rail service is available to potential users in Pioneer Park. The expenditure of nearly \$2 million to connect Pioneer Park to the recently acquired City-owned rail spur serving the Union Pacific Mainline is a current example of this commitment.



City Hall Building
419 Fulton Street
Peoria, Illinois 61602-1283
309/494-8800
FAX 309/494-8658

Rob Happach
Carver Lumber Co.
November 10, 2004
Page 2

Attached is a letter from DOT (Central Illinois Railroad), our current operator for rail service in Pioneer Park which also supports the City's commitment.

Sincerely,


Steve Van Winkle
Public Works Director

Attachment
/kcs

Central Illinois Railroad Company

P.O. Box 361, LaSalle, Illinois 61301
Telephone: (815) 339-6839
Fax: (815) 339-6400

November 10, 2004

Mr. Rob Happach, President
Carver Lumber Co.
8700 North University
Peoria, IL 61615

RE: RAIL SERVICE

Dear Mr. Happach:

Central Illinois Railroad Company, as designated operator over the City of Peoria-owned rail lines connecting Pioneer Park in Peoria with the Union Pacific main line at the northwestern edge of the City of Peoria, I hereby commit to providing service to all existing and future customers, commensurate with their rail transportation needs at a cost no higher than the existing rail operator.

Specifically, we will keep an engine on the line at all times ready to be pressed into service as needed. Crews will be available on short notice to provide needed switching.

A designated customer service representative will be assigned to your account. Central Illinois Railroad will regularly exchange important information regarding car locations along the route, as well as, intended delivery schedules.

Our railroad will honor our contract with the City, which provides that we will pick up and deliver cars within 24 hours after being notified by the Union Pacific that the cars have been placed on the Peoria-Pioneer Spur.

We are looking forward to working with you and Carver Lumber and developing a mutually beneficial business relationship.

Sincerely,



Don L. Gibson
Vice President

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2004, I served the foregoing document, Application
For Adverse Discontinuance Of Operating Authority, by first-class, U.S. mail, postage prepaid on
the following:

Daniel LaKemper, Esq.
Pioneer Industrial Railway Co.
1318 South Johanson Road
Peoria, IL 60617

Mr. Rob Happach
Carver Lumber Company
8700 North University
Peoria, IL 61615

Mr. Wayne Kessler
Peoria Plastics
9000 North University
Peoria, IL 61615

Mr. J.P. O'Brien
O'Brien Steel Co.
1700 Northeast Adams
Peoria, IL 61603

Burlington Northern & Santa Fe Rwy. Co.
2650 Lou Menk Drive, 2nd fl.
P.O. Box 96157
Fort Worth, TX 76161

Iowa Interstate Railroad Ltd.
800 Webster Street
Iowa City, IA 52240

Canadian National Railway Company
935 de La Gauchetiere St. West
Montreal, QC H3B 2M9

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510-2191

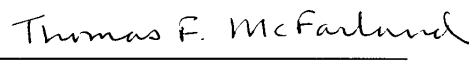
Peoria & Pekin Union Railway Company
301 Wesley Road
Creve Coeur, IL 61610

Toledo, Peoria & Western Railway Corp.
1990 East Washington Street
East Peoria, IL 61611

Union Pacific Railroad Company
Union Pacific Bldg.
1416 Dodge Street
Omaha, NE 68179

Illinois & Midland Railroad, Inc.
1500 North Grand Ave.
P.O. Box 139
Springfield, IL 62705

Director, Bureau of Railroads
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, IL 62764



Thomas F. McFarland